APPENDIX A

Opinion of Court, Filed February 23, 1955

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

N. P. RYCHLIK, individually and on behalf of and as representative of other employees of the Pennsylvania Railroad, *Plaintiff*,

vs.

BROTHERHOOD OF RAILROAD TRAINMEN, an unincorporated association, *Intervening Defendant*,

and

PENNSYLVANIA RAILROAD COMPANY, *Defendant*.

Appearances:

Meyer Fix, 500 Powers Building, Rochester, N. Y., Attorney for Plaintiffs.

Harold J. Tillou, 501 Erie County Bank Building, Buffalo, New York, Attorney for Intervening Defendant, Brotherhood of Railroad Trainmen.

Adams, Smith, Brown & Starrett, Walbridge Building, Buffalo, New York, Attorneys for Defendant, Pennsylvania Railroad Company.

The above entitled matter comes before this Court on an order to show cause obtained by the plaintiff why an order should not be made restraining and granting certain injunctive relief against the defendants, Hartman, Sites, and Gaily, individually and as members of and representatives of the Brotherhood of Railroad Trainmen (hereinafter called "BRT") and the Pennsylvania Railroad (hereinafter called "Penn"). By consent of the parties, the BRT was permitted to intervene as defendants in place of the individuals, Hartman, Sites, and Gaily.

The complaint was verified, and attached thereto was an affidavit of the attorney for the plaintiff, purported to be made on knowledge and not on information and belief. It

will be seen that numerous matters touching the determination herein are included in the affidavit which are not set forth in the complaint. It seems obvious that the attorney could have no personal knowledge of various of the alleged facts set forth in the affidavit. However, in view of the decision at which I arrive, the affidavit of the attorney will be considered.

The defendants have moved to dismiss the complaint on the grounds that the plaintiff has not set forth a cause of action in his complaint; that the Court has no jurisdiction to determine the alleged issues involved; and that the alleged issues are solely within the determination of the System Board of Adjustment established pursuant to the Railroad Labor Act. As alleged in the Complaint, such employees were discharged by Penn upon notice served on or about January 17, 1955 and, as also alleged in the Complaint, during the year 1953 they "allowed their membership to lapse". The plaintiff timely appealed to the System Board of Adjustment and their appeal was pending until January 17, 1955, when the plaintiff was discharged. The delay apparently was caused by the effort to determine whether membership in the United Railroad Operating Crafts (hereinafter referred to as "UROC") constituted compliance with Union Shop Agreement. Meanwhile the plaintiff continued in his employment till his discharge.

A temporary restraining order was sought, but this was refused since the plaintiff had already been discharged. A permanent injunction is now sought for the reinstatement of the plaintiff and his fellow employees on the ground their discharge for non-compliance with the Union Shop Agreement between the BRT and Penn was illegal. A copy of such Agreement was attached as a part of the Complaint. It appears that plaintiff was a member of UROC at the time of his discharge and as appears from the discharge notice set out in the Complaint that plaintiff was discharged because membership in UROC did not constitute compliance with the Union Shop Agreement. (Exhibit A.) The BRT

is a union organization, certified under the Railway Labor Act to represent operating employees of Penn employed as brakemen and conductors on its railroad lines. Plaintiff was a trainman.

On or about the 26th day of March, 1952, BRT and Penn entered into a Union Shop Agreement, pursuant to the provisions of Sec. 2 Eleventh of the Railway Labor Act, as amended. (Exhibit A attached to the Complaint.) Plaintiff asserts that he joined the Switchmen's Union on July 31, 1954 and he presented proof of such membership at a hearing in Pittsburgh, Pa. on August 23, 1954. What his status was as regards UROC then or now does not appear.

In the complaint there is no allegation that the plaintiff became a member of UROC, but the affidavit contains this statement: "In or about February 2, 1953, the plaintiff, Rychlik, resigned his membership from the said BRT and became a member in good standing of the Railroad Operating Crafts, which the plaintiff fully believed in good faith to be a railroad union national in scope.

It is significant that this is made by the attorney for the plaintiff. It also appears from a further statement in such affidavit that plaintiff was a member of the BRT until in or about February, 1953. On August 23, 1954, at Pittsburgh, Penn., the plaintiff presented proofs showing that he had joined the Switchmen's Union of North America on July 31, 1954, and that the plaintiff was a member in good standing in the Switchmen's Union as of the time of the hearing; that since that time he has continued as a member in good standing of the Switchmen's Union of North America, which is recognized as being national in scope. It is alleged that there has been no conclusive determination of the status of the said UROC. On January 3, 1955, plaintiff was notified by the System Board of Adjustment of its decision that he had not complied with the Union Shop Agreement between the Penn. and BRT (Exhibit "B" attached to complaint). On January 14, 1955, he was orally

notified by the defendant company that he was out of the service. On January 17, 1955, he received a written notification of the termination of his service as of January 14, 1955.

There is nothing in the complaint or affidavit which shows that plaintiff ever resigned membership in the UROC.

Section 153, Title 45, insofar as applicable, provides for the composition of Adjustment Boards and provides:

> "Section 153
> First.
>
> (h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:
>
> First Division: To have jurisdiction over disputes involving train-and-yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organization of the employees.
>
> Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board."

Section 152, Title 45, deals with collective bargaining and agreements between carriers and labor organizations and provides, in part:

"Section 152

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representatives of the craft or class for the purposes of this chapter.

* * * a labor organization * * * duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of th eemployee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

Eleventh.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, * * * if said employee shall hold or acquire membership in any one of the labor organizations, *national in scope*, (italics supplied) organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; * * * *Provided, however*, That as to an

employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, *national in scope* (italics supplied) organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him."

In pursuance of the provisions of the Act, the BRT and the Penn. entered into an agreement (Exhibit "A" attached to complaint). Subdivisions 5 and 7 of that agreement are pertinent to the issues herein and provide:

"5. (a) The General Chairman of the Brotherhood will, between the fifteenth day and the last day of any calendar month, furnish to the Superintendent of the Division involved, in writing and in duplicate, the name and roster number of each employee whose seniority and employment the Brotherhood requests be terminated by reason of failure to comply with the membership requirements of this agreement.

(b) In the event that the Superintendent wishes to dispute the correctness of the Brotherhood's position, he shall so notify the General Chairman within ten (10) calendar days of receipt of the notice from the latter, stating the reasons therefor. If no such exception is taken by the Superintendent, or if the General Chairman does not withdraw the notice within ten (10) calendar days from the date of the Superintendent's notice of exception, the Superintendent will transmit to the employee at his last known address through registered United States mail with return receipt requested, the original of the General Chairman's notice, accompanied by an explanatory letter.

(c) Within ten (10) calendar days from the date of the Superintendent mailing notice to the employee, as provided in paragraph (b) of this Section 5, the said employee's seniority and employment in the crafts or classes represented by the Brotherhood shall be terminated, unless the notice is withdrawn by the Brother-

hood in the interim, or unless a proceeding under the provisions of Section 7 of this agreement is instituted.

7. (a) For the sole purpose of handling and disposing of disputes arising under this agreement, a System Board of Adjustment is hereby established, in accordance with Section 3, Second, of the Railway Labor Act, as amended, which shall consist of four members, two to be appointed by the Carrier and two by the Brotherhood.

(b) An employee notified in accordance with the provisions of Section 5 hereof that he has failed to comply with the membership requirements of this agreement and who wishes to dispute the fact of such failure shall, if he submits request to the Secretary of the System Board of Adjustment within a period of ten (10) calendar days from the date of mailing of such notice, be given a hearing. The Secretary of the Board will notify the employee in writing the time and place at which such hearing will be held. The hearing shall be confined exclusively to the question of the employee's compliance with the provisions of this agreement. The employee will be required at this hearing to furnish substantial proof of his compliance with the provisions of this agreement.

(c) The decision of the System Board of Adjustment shall be by majority vote and shall be final and binding."

It appears from the complaint and affidavit herein that this agreement was in effect at the time the plaintiff resigned from the BRT in February of 1953, and that in accordance with that agreement, his grievance was heard before the System Board of Adjustment set up in accordance thereto. The proceedings before said Board were not certified herewith in this action nor was any transcript of the same furnished to the Court; in fact, the complaint itself is silent as to any such proceedings, nor does the prayer of said complaint request that such a review be made by the Court. The affidavit of the attorney for the plaintiff states that the proceedings were conducted before the System

Board of Adjustment and that as a result of said proceedings, the discharge of the plaintiff was ordered. (See Exhibit "B" attached to the affidavit.)

That courts have reviewed proceedings before the System Board of Adjustments is well established.

Edwards v. *Capital Airlines,* 176 F. (2) 755
Michaels v. *National Tube Co.,* 122 Fed. Supp. 726
Washington Tennessee Co. v. *Boswell,* 124 F. (2) 235

But even in those cases where the court reviewed such proceedings, it was held that judicial inquiry is at an end since it is determined (1) That the Board's procedure and the award conform substantially to the Statute and Agreement; (2) That the award confined itself to the letter of submission; and (3) That the award was not arrived at by fraud or curruption. *Farris* v. *Alaska Airlines,* 113 Fed. Supp. 907; *Moore* v. *Illinois Central,* 312 U. S. 630. There is nothing before the Court from which it can determine that the procedure and finding before the System Board of Adjustment did not conform substantially to the Statute and Agreement or that the finding of the Board was not confined to the matter submitted to it or that the award was arrived at by fraud or corruption. In *Bauer v. Eastern Airlines,* 214 F. (2) 623, the court, in reviewing the action of the Board had before it the entire administrative record from which it could properly review and pass on the propriety of the same. This Court has not been given the benefit of the record before the Board and of necessity must confine itself to the papers before it. The Court will not consider *de novo* the circumstances of the discharge of the plaintiff. See *Bauer* v. *Eastern Airlines,* supra. This does not mean that in a proper case the court would be foreclosed from considering the essential fairness of the administrative proceeding, even if the issues are raised collaterally, and in a proper case, it would be the duty of the court to determine whether the Board had given the plaintiff a full and fair hearing and exercised its honest judgment in reaching its conclusion.

The fact that the agreement between the BRT and the Railroad provides for a System Board consisting of two representatives of the Railroad and two from the Union does not per se make such an agreement invalid. The courts, in recent years, have had before it for review many cases conducted before Boards of a similar structure and have commented that when a Board is so constituted, the award itself is presumably valid, (*Edwards* v. *Capital Airlines*, supra) but in a proper proceeding is not immune from judicial examination nor is the fact that some member of the Board might be prejudiced or that they might make an erroneous decision sufficient to give the court jurisdiction. There is no allegation in the complaint or proof submitted that any member of the Board so discriminated against the plaintiff as to bring this case within the rule of *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192. The Court is not faced with an agreement illegal in itself which might give it jurisdiction under the *Steele* case, supra. See also *Tunstall* v. *Brotherhood of Locomotive Firemen, Enginemen*, 323 U. S. 210 and *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U. S. 768. The courts have, on many occasions, distinguished between the *Steele, Tunstall*, and *Howard* cases, supra, and cases such as the case at bar which involves the interpretation or application of agreements, and that distinction has been made clear in many decisions, e. g., *Spires* v. *Southern Railway Co.*, 204 F. (2) 453; *Hayes* v. *Union Pacific Railroad Co.*, 184 F (2) 337; *United Railroad Operating Crafts* v. *Northern Pacific Railroad Co.*, 208 F. (2) 135, cert. den. 347 U. S. 929; and *United Railroad Operating Crafts* v. *Pennsylvania Railroad*, 212 F. (2) 938.

In the instant case, neither the Railroad nor the Brotherhood has filed any answer, but the question of jurisdiction and sufficiency of the complaint have been raised by both, and the Court, in any event, would be bound to consider such questions even if not raised. *U. S.* v. *Corrick*, 298 U. S. 435, *United R. R. Operating Crafts* v. *Pennsylvania Railroad*, 221 F. (2) 938; and the recent case of *Alabaugh* v.

Baltimore & Ohio Railroad Co., 125 Fed. Supp. 401. This Court, on the facts presented, finds no invalidity in the agreement.

The plaintiff claims that after his resignation in the BRT, the BRT refused to reinstate him. There appears to be no grounds for the equitable intervention of this Court for such refusal. A like question was discussed by the court in *Alabaugh* v. *Baltimore & Ohio Railroad Co.*, supra, wherein the court, at page 407, said:

> "When plaintiffs applied for reinstatement in Brotherhood, it was within the discretion of that organization whether or not they should be reinstated. There is no provision in the statute or in the agreement with B & O which requires such action.
>
> The courts cannot require individuals or associations to be forgiving or generous nor prevent the operation of the rule that "they that take the sword shall perish with the sword" unless some constitutional or other legal right or immunity is threatened. Nor does the action of Brotherhood in reinstating some members who had been less active in UROC create any right in plaintiffs to secure an order for reinstatement in this case.
>
> So far as Brotherhood's refusal to reinstate plaintiffs affects their discharge by B & O, it is clearly a dispute similar to those which the courts have held to be within the primary jurisdiction of the Adjustment Board."

The plaintiff also claims that at the time of his discharge, he was a member of the Switchmen's Union of North America, a union "national in scope", recognizable under the Railroad Act. Unquestionably, the Act itself does not require any employee to belong to any particular Union as long as it has been recognized as national in scope and the majority of any craft have the right to determine who shall be the representatives of the craft or class (Sec. 152, Title 45, U.S.C.), and that nothing in any agreement shall prevent the employee from changing membership from one organization to another organization (Sec. 152, Eleventh

(c), Title 45, U.S.C.) It would appear that the Act, however, contemplates the continued membership in a Union national in scope. That the BRT and Switchmen's Union are such is admitted. The plaintiff in the instant case ceased, by his own act, his membership in BRT and did not join the Switchmen's Union until shortly before his final hearing before the System Board in August 1954, although he had been cited before the Board and given a hearing as early as August of 1953. Judge Thomsen, in the *Alabaugh* case, at pages 406 and 407, stated:

> "*Maintenance* of membership within the contemplation of that amendment means continued payment of dues to a qualifying union. The reason for such requirement is obvious, and is discussed in *Pigott* v. *Detroit T. & I. R. Co.*, 116 Fed. Supp. at 955, note 11. In the case at bar plaintiffs withdrew from the Brotherhood and stopped paying dues to it For that reason they were expelled by Brotherhood, and are being discharged by B & O."

And again:

> "Plaintiffs voluntarily stopped paying dues to Brotherhood and terminated their membership therein, in order to join and be active in a rival union. Plaintiffs gambled heavily for a stake which must have seemed worth the risk to them at that time. By terminating their membership in Brotherhood and ceasing to pay dues to it, they made themselves subject to discharge by B & O under the terms of the union shop agreement, unless they could show that UROC was a labor organization which qualified under section 152 Eleventh (c). * * * But they have chosen to stake all on UROC. Having lost, they sought reinstatement in Brotherhood."

I therefore hold that the Statute itself contemplates continued membership in a qualified union and that that question was one for proper determination in the first instance by the System Board of Adjustment. The plaintiff, in his brief, has requested this Court to pass on the question as to whether UROC is national in scope.

It is not necessary for this Court to decide under the facts submitted in this case whether UROC is a labor organization "national in scope." In fact, that function, under the Railway Act, is left to specific administrative procedure. The National Mediation Board, provided for in Section 154, Title 45, U.S.C., and consisting of three public members appointed by the President, is authorized (Sec. 152, Ninth, 45 USC) whenever a jurisdictional dispute arises between rival unions, to investigate such dispute and then to certify the union which is to act as bargaining representative for the employees in question. Such certifications are held to be exclusively within the competency of the National Mediation Board and its decisions are conclusive and not subject to review. *Switchmen's Union of North America* v. *National Mediation Board,* 320 U. S. 297; *General Committee* v. *Missouri K. T. R. Co.,* 320 U. S. 323.) In the latter case, the court said:

> "However wide may be the range of jurisdictional disputes embraced within Section 2, Ninth, Congress did not select the Courts to resolve them. To the contrary, it fashioned an administrative remedy and left that group of disputes to the National Mediation Board."

The special administrative procedure of Section 153 is therefore vested with exclusive jurisdiction to determine whether a labor organization is national in scope and organized in accordance with the Act when a dispute arises pursuant to the right of the labor organization to participate in the National Railroad Adjustment Board machinery as said in *Pigott v. Detroit, T. & I. R. Co.,* 116 F. Supp. 949 (1953) at page 954:

> "It is the type of issue which those that are conversant with the specialized problems of the railroad industry are most capable of evaluating."

Again, the court, in the Pigott case, remarked:

> "If the question of its status were open to the courts, which are located in various areas of the nation, it is

conceivable that such different jurisdictions would reach contrary conclusions if concurrent suits with separate carriers were to be litigated."

For the reasons stated herein, the Court denies the application for an injunction pendente lite and the motion to dismiss the complaint is granted. (Entry of the order herein, however, will be delayed for the period of one week to afford the plaintiffs opportunity to apply for an injunction pending appeal if they decide to appeal.

JOHN KNIGHT
United States District Judge

February 23, 1955.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 114—October Term, 1955.

(Argued November 17, 1955 Decided January 9, 1956

Docket No. 23709

N. P. RYCHLIK, individually, and on behalf of those similarly situated, *Appellant*,

v.

PENNSYLVANIA RAILROAD COMPANY, *Defendant-Appellee*,

and

BROTHERHOOD OF RAILROAD TRAINMEN, *Intervenor-Appellee*.

Before:

HAND, FRANK AND MEDINA, *Circuit Judges*.

Appeal from a judgment of the District Court for the Western District of New York—Knight, *J.*, presiding—summarily dismissing a complaint for reinstatement as a member of the intervening union and as an employee of the defendant railroad.

NORMAN M. SPINDELMAN *for the appellant.*
RICHARD N. CLATTENBERG *for the Railroad.*
HAROLD J. TILLOU *for the Union.*

HAND, *Circuit Judge*:

The plaintiff appeals from a judgment, summarily dismissing his complaint against the defendant Railway and the intervening Union (a trades-union of railway conductors and brakemen). The complaint alleged that the plaintiff had been employed as a "trainman" of the Railway at a time when he was a member of the Union, from which he

resigned in February, 1953, and in which other "trainmen," on whose behalf he sued, as "similarly situated," had allowed their membership to lapse. Shortly thereafter the plaintiff and the others, "similarly situated," joined another union, which it will be convenient to call U. R. O. C., and which they supposed to be "national in scope." The Railway and the first union had executed a Union Shop Agreement under subdivisions Eleventh, (a) and Eleventh, (c), of §152 of Title 45, U. S. Code, which required employees to keep up their membership in the Union, or in another union, "national in scope," in order to be eligible as employees of the Railway. In execution of this contract the Union and the Railway had set up a "System Board of Adjustment" under §153, Second, of Title 45, to appear before which the "Union" cited the plaintiff, and which after a hearing decided that membership in "U. R. O. C." was not a compliance with the Union Shop Agreement. This resulted in depriving the plaintiff and the others, "similarly situated," of employment by the Railway, and he brought this action to procure reinstatement in the Union and reemployment by the Railway.

The plaintiff assumes that the District Court has jurisdiction to issue a mandatory injunction compelling the defendants to accept the plaintiff as a member of the Union and as an employee of the Railway; but we need not decide more at this stage of the case than that in any event the action may stand as one for a declaratory judgment under §2201, Title 28, U. S. Code. There is an "actual controversy within its" (the District Court's) "jurisdiction," for the plaintiff claims the right to membership and employment by virtue of statutes of the United States.* Section 2202 allows us to reserve our decision as to what "necessary or proper relief * * * may be granted," if he proves his case upon a trial.

The plaintiff raises two objections to the award of the "System Board": (1) it had no jurisdiction over disputes

* §1337, Title 28, U. S. C.

between a union and its members or past members; and (2) the particular board here involved was disqualified to decide the issues, because two of its four members were members of the Union which the plaintiff and his fellows had abandoned in order to join "U. R. O. C." Our decision in *U. R. O. C.* v. *Wyer*, 205 Fed. (2) 153 (affirming on his opinion Judge Conger's dismissal of the complaint—115 Fed. Supp. 359), is an answer to the first point. It is true that the case involved the jurisdiction of the National Adjustment Board, and not that of a "System Board," but subdivision §153, Second, gives to such boards authority to adjust and decide "disputes of the character specified in this section": that is, in subdivision First, which defines the authority of the National Adjustment Board. Indeed, independently of that decision as a precedent, we should have no doubt that the dispute at bar was within §153, First, (i), as a dispute "between an employee or group of employees and a carrier * * * growing out of the interpretation or application of agreements concerning * * * working conditions." How far the award of the "System Board," constituted as it was, is exempt from judicial review is indeed a different matter, upon which the courts do not appear to be in entire accord. All that we decided in *U. R. O. C.* v. *Wyer, supra,* was that an aggrieved union or employee must in any event first resort to the appropriate panel—in that case a panel of the National Adjustment Board—before it may apply to a court. Since, however, the text of §153 applies without reserve to the occasion at bar, the award of the "System Board" will be final, unless either it is proper to imply an exception when half its members are members of the recognized union; or, if that be an unwarranted interpolation, then unless the section is *pro tanto* unconstitutional.

The defendants rely upon the decisions of the Seventh and Sixth Circuits in *U. R. O. C.* v. *Pennsylvania Railroad,* 212 Fed. (2) 938, and *Pigott* v. *Detroit, T. & I. R.R. Co.,* 221 Fed. (2) 736 In the first of these the only actual holding was that the "primary jurisdiction" of such disputes

as that at bar was in the "System Board";* but the court went on to discuss the question whether a "competing" union, which the aggrieved employee asserted to be within §152, Eleventh, (c), was "national in scope," might be decided in a proceeding under §153, First, (f). The court did not indeed say that such a proceeding was an adequate remedy for any bias of the "System Board"; but we are in doubt as to what other significance the discussion was meant to have. At any rate the Sixth Circuit in the later case had before it an action brought after the employee had failed before the "System Board," in which he and the "competing" union both protested against the ruling of the board because of its presumptive bias; and the court plainly held that a proceeding under §153, Second, (f) was an adequate remedy. That decision is flatly in favor of the defendants at bar, and if the appeal is to succeed, we must interpret the Act differently, or declare it unconstitutional. Before discussing that question it will make our position plainer, if we say what we understand this supposed alternative remedy to be.

Subdivision (a) of §153, First, prescribes as one among the qualifications of a union that is to be an elector of unions representing employees in panels of the National Adjustment Board, that it shall be "national in scope." In case a union's claim to be chosen as an elector is disputed, §153, First, (f) declares that the Secretary of Labor shall first investigate the claim, and, if he decides it "has merit," that he shall notify the Mediation Board. That board will then ask those unions already qualified as electors to select one of their members to serve upon a "board of three" to pass upon the dispute, the applicant itself will select another member, and the Mediation Board will select the third. If the "board of three" grants the application of the union, it will necessarily have found that it is "national in scope"; and the argument appears to be that that is an adequate remedy for any bias of the "System Board," ap-

* *Slocum* v. *Delaware, L. & W. R.R. Co.*, 339 U. S. 239.

parently because the finding of the "board of three" on that issue will be final.

With deference we cannot agree with this reasoning. In the first place when a union applies to be chosen as an elector there are other conditions that it must satisfy besides being "national in scope", *i. e.*, it must be "organized in accordance with" the Act, and it must be "otherwise properly qualified to participate in the selection of the labor members" of the National Board. (§153 First, (f).) The "board of three" may of course make a specific finding that the applicant union is not "national in scope," as the ground of refusing to admit it as an elector; but if it fails to do so, it will be impossible to know whether this was in fact its ground for refusal; and a proceeding that may leave this issue undecided can hardly be intended as a remedy for any bias of the "System Board." Moreover, in any event the decision of the "board of three" would not be an adequate remedy to the employee. If for instance the "competing" union did not wish to be an elector, there is no reason why that should forfeit the employee's right to an impartial tribunal in deciding whether he should hold his job. Employees have no means of compelling the "competing" union to apply to be an elector; and, even if they had, we can see no justification for forcing them to accept that union as a surrogate to assert their right. As we read §153, Eleventh, (c), their jobs are dependent only upon whether the "competing" union is in fact "national in scope"; and the Act should be construed to grant them the personal privilege of proving their right before an impartial tribunal.

If there is no alternative remedy open to the plaintiffs at bar, there must be some kind of judicial review of the finding against them by the "System Board." Nothing could more completely defeat the most elementary requirement of fair play; and nothing would more firmly entrench the recognized union in power; the temptation to fetch all jobs into that union would ordinarily be irresistible, espe-

cially when we remember that the union members of a "System Board" are likely to be persons of consequence in the union itself. Although it is true that *Edwards* v. *Capital Airlines*, 176 Fed. (2) 755 (C. A. D. C.) arose under other sections of the Act, its *ratio decidendi* applies so exactly to the case at bar that we adopt it as a precedent.

If it be argued that the result of our decision is inevitably to interject the courts into the enforcement of the right granted by §152, Eleventh, (a), we answer that that is not necessarily true. Section 153, Second, provides that if either party to an "arrangement" setting up a "System Board" is dissatisfied, it may "elect to come under the jurisdiction of the Adjustment Board." Whether this implies that, if "dissatisfied," the parties must altogether abandon a "System Board" "arrangement," after they have set it up; or whether it allows them to limit the scope of its jurisdiction, we need not say. If it means the second, it will be possible in the agreement setting up a "System Board" to refer disputes such as that at bar to a panel set up under the National Adjustment Act, which can presumably be made impartial. If it means the first, it would indeed result in making inevitable a court review when a "System Board" decides against an employee in situations like that at bar. We can only answer that in that event there is a public interest in the impartial protection of any rights granted by an Act of Congress that transcends the immunity of labor disputes from all surveillance by a court of law.

Judgment reversed; cause remanded for trial in accordance with the foregoing opinion.

APPENDIX C

Relevant Statutory Provisions

Sections 2 and 3 of Title I of the Railway Labor Act, as amended (48 Stat. 1186, 1189, 64 Stat. 1238; 45 U. S. C. §§152, 153) provide in part as follows:

"Section 2. * * *

"Eleventh. Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted—

"(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: Provided, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other members or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

"(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties uniformly required as a condition of acquiring or retaining membership:

Provided, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

"(c) The requirement of membership in a labor organization in an agreement made pursuant to sub-paragraph (a) shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in section 3, First (h) of this Act defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: Provided, however, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services such employee, as a condition of continuing his employment may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him; Provided, further, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organi-

zation to another organization admitting to membership employees of a craft or class in any of said services.

"(d) Any provisions in paragraphs Fourth and Fifth of section 2 of this Act in conflict herewith are to the extent of such conflict amended."

"SEC. 3. First. There is hereby established a Board, to be known as the 'National Railroad Adjustment Board', the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

"(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 2 of this Act.

"(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or through an officer or officers designated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one representative on any division of the Board.

"(c) The national labor organizations as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one representative on any division of the Board.

"(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

"(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after the passage of this Act, in case of any original appointment to office of a member of the Adjustment Board, or in a case of vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

"(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Laor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representatives, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with section 2 hereof and is likewise properly qualified to participate in the selection

of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

"(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

"(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

"First division: To have jurisdiction over disputes involving train and yard service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

"Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

"Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees,

freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members five of whom shall be selected by the carriers and five by the national labor organizations of employees.

"Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

"(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

"(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when prop-

erly submitted, at any place designated by the division: Provided, however, That final awards as to any such dispute must be made by the entire division as hereinafter provided.

"(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as 'referee', to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board should be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees.

"(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the representative parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

"(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

"(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay the employee the sum of which he is entitled under the award on or before a day named.

"(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the Adjustment Board shall be *prima facie* evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

"(q) All actions at law based upon the provisions of this section shall be begun with two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

"Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, form mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board."